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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Services in the United States	)	IB Docket No. 96-111
	)	
and	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
and	)	
	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

To: The Commission

COMMENTS OF LOCKHEED MARTIN CORPORATION

Gerald Musarra
Senior Director, Commercial Programs
Space and Strategic Missles Sector
Lockheed Martin Corporation
1725 Jefferson Davis Highway
Arlington, VA 22202-4127

Debra A. Smilley-Weiner
Deputy General Counsel
Lockheed Martin Astro Space Commercial
P.O. Box 800
Princeton, NJ 08543-0800

July 15, 1996

SUMMARY

Lockheed Martin Corporation hereby comments on the Commission's rulemaking proposal to codify its access policy for non-U.S.-licensed satellites as the "effective competitive opportunities test for satellites" or "ECO-Sat" test. The ECO-Sat test is an important component — in combination with ongoing efforts at the World Trade Organization and in the Policy Forum of the International Telecommunication Union — of a cohesive U.S. Government policy initiative designed to ensure that U.S. satellite operators have the opportunity to gain the access to foreign markets that they require in order to compete fairly and vigorously with foreign systems on the same routes. As explained and clarified below, Lockheed Martin fully supports the basic principle underlying the ECO-Sat test — i.e., that the Commission will grant U.S. earth stations the right to access a non-U.S. satellite to the extent that U.S. satellite operators have an effective opportunity to compete in the provision of analogous services in the relevant market(s) of the non-U.S. satellite.

Lockheed Martin agrees with the Commission that access to non-U.S. satellites should be regulated through the licensing of U.S. earth stations (transmit/receive and receive-only), and not through mandatory licensing or re-licensing of space stations. By using a process that focuses on earth stations, the Commission can address its pro-competitive objective in a narrowly-tailored manner that, in contrast with the space station licensing process, does not impact upon the technically-oriented objectives of the coordination process sheparded by the policies and regulations of the International Telecommunication Union.

In applying its ECO-Sat test, the Commission should examine all factors relevant in a particular case to the provision of a particular service or service mix. It should not dwell unduly on questions of whether an identified restraint on competition is *de jure* or *de facto*, or on questions related to burdens of proof. Precisely what constraints will be relevant in a given proceeding will vary from case to case, and the Commission should take a pragmatic and open-minded approach in applying the ECO-Sat test. The Commission should also set up a mechanism for ensuring ongoing compliance with the test's policy objectives.

Lockheed Martin generally supports the Commission's proposal to rely on "home markets," "route markets," and "critical mass," but advises that it may be difficult to develop a bright line standard for determining when each type of evaluation should be conducted. Instead, it urges the Commission to adopt the various approaches to market analysis that are outlined in the NPRM as guidelines, and permit applicants and opponents to argue the markets that should be used for comparison purposes in a particular application of the ECO-Sat test. Lockheed Martin offers its thoughts on essential components of the critical mass test, and reserves further detailed elaboration for its reply comments.

Finally, Lockheed Martin urges the Commission to examine all pertinent attributes of Intergovernmental Organizations ("IGOs") and their privatizing or privatized spin-offs when considering U.S. earth station applications for authority to communicate therewith. Heightened scrutiny is essential as a result of the privileges and immunities to which the IGOs were subject, and the continuing perception that these benefits have been passed on to some degree to IGO spin-offs and impact the provision of domestic service by IGOs themselves.

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To: The Commission

COMMENTS OF LOCKHEED MARTIN CORPORATION

Lockheed Martin Corporation, ("Lockheed Martin"), pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby comments on the Commission's Notice of Proposed Rule Making in the above-captioned proceeding.[1/] In its NPRM, the Commission proposes the adoption

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1/ IB Docket No. 96-111, CC Docket No. 93-23, RM-7931, File No. ISP-92-007 (FCC 96-210), slip op. (released May 14, 1996) ("NPRM"). Lockheed Martin is a major aerospace and defense company specializing in the development of sophisticated spacecraft, launch systems, and other high technology products. Lockheed Martin has applied to the Commission for authority to establish a global geostationary fixed satellite service system and has interests in other satellite systems and services as well. Its interest in this

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of an "effective competitive opportunities" test (the "ECO-Sat" test) as an essential component of its framework for evaluating requests for authority to access satellite systems that are licensed by countries other than the United States. Lockheed Martin fully supports the basic principle underlying the ECO-Sat test — *i.e.*, that the Commission will grant U.S. earth stations the right to access a non-U.S. satellite to the extent that U.S. satellites have an effective opportunity to compete in the provision of analogous services in the relevant markets of the non-U.S. satellite.

Although Lockheed Martin supports the initiative taken in the Commission's NPRM, it recognizes that the ECO-Sat test is not a panacea in and of itself. As a practical matter, the various entities to whom the test would be applied are very likely to be limited in number. Recognizing this limited applicability, Lockheed Martin views the test as a useful component of a broader U.S. Government initiative to ensure that U.S. satellite system operators — whether their systems are regional or subregional single-service operations, or global providers of a myriad of different services — gain the access to foreign markets they require to be competitive.

Moreover, the idiosyncratic nature of the service offerings to be made on the systems to be compared under the ECO-Sat test argues for an approach to implementing the test that is both flexible and relatively simple: the Commission should, in effect, adopt the various market identification approaches discussed in the NPRM and additional relevant factors as guidelines (rather than detailed, complex rules). This would enable the Commission to implement the ECO-

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[1/](...continued)
proceeding is based on the effects the Commission's proposals may have on its satellite-related businesses and the ability of the U.S. satellite industry to be an effective competitor in the rapidly evolving global telecommunications marketplace.

Sat test without undue delay, and with sufficient latitude to accommodate the unique factors of the particular proposals presented in earth station applications.

I. The ECO-Sat Test Marks An Important First Step Toward The Achievement Of The Commission's Regulatory Objective Of Fostering Fair And Vigorous Competition In The Provision Of International Satellite Services.

The rapid technical evolution and increasing globalization of satellite services heightens the importance to U.S. satellite systems of securing access to foreign markets on a fair and competitive basis. The ECO-Sat test, by itself, however, will likely have limited beneficial effect on international competition in the provision of satellite services. Only a handful of countries are directly involved in development of non-U.S. communications satellite systems, and would therefore have a significant interest in the opening of U.S. markets. Moreover, even some of these countries may be only indirectly influenced by the Commission's proposed ECO-Sat test, since they are entering into or have already entered into treaties with the U.S. governing market access for certain types of satellite services, or are the subjects of limited findings of effective competitive opportunities in specific cases [2/]

As a consequence, it is vitally important that the U.S. Government continue to work in all relevant fora to foster unimpeded worldwide market access on fair, pro-competitive terms. In addition to finalizing the current proposal, the Commission and the rest of the Government should pursue an effective multilateral understanding concerning satellite services in the basic telecommunications negotiations currently underway under the auspices of the World Trade Organization, at the International Telecommunication Union ("ITU") Policy Forum scheduled for

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2/ See, e.g., Vision Accomplished, Inc., 11 FCC Rcd 3716 (Int'l Bur. 1995); IDB WorldCom Services, Inc., 10 F.C.C. 2d 7278 (Int'l Bur. 1995).

this October, in bilateral negotiations with other countries, and in further elaboration of U.S. policies on the restructuring of intergovernmental organizations ("IGOs") such as Intelsat and Inmarsat. These are important, interrelated efforts, and the Commission should thus carefully consider the interplay between its current proposal and the likely outcomes of initiatives in various other relevant fora.

In sum, the Commission should not expect the ECO-Sat test and the related policies proposed in the NPRM to result, without more, in fair and open global competition among satellite systems: it cannot be equated, particularly over the longer term, with a satisfactory multilateral arrangement for securing open market access. Nevertheless, Lockheed Martin believes that the ECO-Sat test can serve as one critical tool among several that the U.S. can use to achieve this commendable objective. Accordingly, Lockheed Martin generally supports the Commission's proposals in this NPRM with the following comments and qualifications designed to enhance their effectiveness.

II. The FCC Should Regulate Access To Non-U.S. Satellites Through The Licensing Of Earth Stations, And Licensing-Related Requirements Should Not Be Imposed On Non-U.S. Satellites.

Lockheed Martin supports the Commission's tentative determination to regulate non-U.S. satellite access to U.S. markets through the licensing of earth stations located in the United States that seek to communicate with such systems.[3/] The Commission's rules already require earth stations in the U.S. to obtain a license to communicate with non-U.S. satellites, and the Commission could simply incorporate the rules adopted in this proceeding into its existing

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3/ See NPRM, FCC 96-210, slip op. at ¶ 14.

regulatory framework. The procedural approach outlined by the Commission would be administratively efficient, and the Commission's right to exercise sovereignty over earth stations in the United States is beyond question.

Lockheed Martin also supports the Commission's tentative conclusion not to require a satellite that has already been coordinated or licensed outside the United States to obtain a space station license from the Commission before serving the U.S.[4/] The Commission's exclusive objective here should be to ensure fair and vigorous competition. The licensing process encompasses far more, and would impact the technical matters that are covered by U.S. treaty obligations under the Convention of the International Telecommunication Union and the ITU's Radio Regulations.[5/]

As the Commission notes, foreign administrations "understandably expect the United States to accept the sufficiency of satellite licensing procedures abroad — as we expect them to accept the sufficiency of our procedures."[6/] Were the Commission to disregard this expectation by imposing re-licensing requirements on foreign-licensed satellite systems, foreign administrations would be certain to respond by establishing re-licensing procedures for systems already licensed in the U.S. Such re-licensing requirements for U.S. satellites would inevitably increase their cost of providing service and would delay — and quite possibly entirely block — service by U.S. satellites to many parts of the world. Accordingly, it is vital to the U.S. satellite industry that the Commission set an

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4/ Id., at ¶ 14.

5/ Indeed, as the Commission notes, the ITU requires each satellite to be registered and coordinated internationally by only one administration. Id.

6/ Id.

example for the rest of the world by refraining from direct licensing of non-U.S. satellites, as well as from imposing other requirements that would be tantamount to the same thing.

In particular, Lockheed Martin urges the Commission not to intermingle the considerations relevant to the application of the ECO-Sat test to applications by earth station operators for authority to access non-U.S. satellites with international issues relating to spectrum scarcity in particular frequency bands, orbital congestion, and other such topics that are usually addressed in the first instance within the various organs of the ITU. Lockheed Martin is particularly concerned about the Commission's apparent proposal to require (as opposed to permit) non-U.S. satellite operators to participate in domestic U.S. licensing processes in certain instances before access can be secured to the U.S. market in competition with U.S. providers (see NPRM, slip op. at ¶¶ 16-17). As licensing *ab initio* would apparently be required in some cases, the proposal could conflict both with the Commission's tentative determination (which Lockheed Martin supports) not to require the relicensing of non-U.S. satellites and with its decision to concentrate its policy efforts on the licensing of U.S. earth stations. Moreover, the processing-round proposal could have other implications, including complicating the already complex U.S. licensing process, and vesting non-U.S. entities with substantive and procedural rights that U.S. operators may not enjoy in the corresponding overseas countries. In addition, it could place the Commission in a position whereby the U.S. Government would be susceptible to charges of becoming the world's regulator of spectrum.[7/] Lockheed Martin believes that these and other potential concerns should be more

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7/ Given the global aspirations of many U.S. satellite operators (both in the mobile-satellite services and fixed-satellite services markets), it is imperative that the Commission not foment the perception within the international community that non-U.S. satellite operators must do more than is required by the ITU Convention and radio regulations before they

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carefully considered by the Commission, and it reserves the right to comment further on this aspect of the NPRM.

III. Lockheed Martin Supports The Examination Of All Factors Relevant To Market Entry, And Believes The Ultimate Burdens Must Be On The Applicant.

Lockheed Martin supports the Commission's proposal to examine both *de jure* and *de facto* barriers to U.S. access to relevant foreign markets. Clearly, a meaningful evaluation of the competitive situation with respect to a particular service proposal can only be made if all relevant factors are considered.[8/]

The factors to be considered with respect to each application must necessarily vary with the particular service proposal. In some cases, laws or regulations pertaining to the content of transmissions may be relevant while local zoning ordinances may be relevant to others. To the extent that an applicable restriction is embodied in a law, regulation, official pronouncement or edict, or judicial decision or decree, it should be the applicant's responsibility and burden to show

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[7/](...continued)
may operate. It must strictly segregate issues of market access from issues associated with the technical operations of spacecraft, and the interposition of an additional "licensing" requirement contravenes this objective.

[8/] Id. In this respect, Lockheed Martin supports the Commission's proposal to examine (i) issues of national security, law enforcement, foreign policy and trade, (ii) the general significance of the proposed entry to the promotion of competition in the United States and in the global satellite service market, and (iii) good faith spectrum coordination efforts by the coordinating/licensing country of the non-U.S. satellite in question. See id., at ¶¶ 48, 49. Consideration of these broader concerns as part of the same process that incorporates the ECO-Sat examination is an administratively efficient way for the Commission to pursue its pro-competition objectives while carrying out its duty to protect other important public interest objectives.

why grant notwithstanding those restrictions should be deemed consistent with the public interest.[9/] If, however, a restriction is not so embodied — e.g., a situation where the licensing administration of the non-U.S. satellite has not permitted local earth stations to access U.S. satellites or the local telephone monopoly refuses to interconnect their traffic — the opponents of the earth station application should have the burden of identifying and explaining the barrier. Once the opponent has made this *prima facie* showing, it would be up to the applicant to demonstrate that the barrier does not exist. The applicant should also disclose any other barriers to the best of its knowledge, and show how the public interest would not be disserved thereby. By apportioning the burden among the applicant and opponents in this way, the Commission's process will have a reasonable level of reliability without imposing undue burdens on earth station applicants.

In the final analysis, Lockheed Martin believes that the Commission must decide each proceeding on the basis of the information before it. In so doing, the Commission should not place undue emphasis on matters such as the placement of procedural burdens. Rather, the Commission should ensure that it has before it information relevant to making a public interest determination as to whether permitting a U.S. earth station to access a non-U.S. satellite for the provision of a

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9/ In this regard, Lockheed Martin believes that the Commission's proposal to require U.S. satellite operators to periodically inform the Commission of all foreign destinations where they are permitted to provide service, as well as a general description of the services they are permitted to provide, could have limited usefulness in assisting the evaluation of *de jure* restrictions for a particular country. See id., at ¶ 39. The fact that one, or even a few, U.S. satellites have access to a particular market may not by itself be a reliable indication that *de jure* barriers have been eliminated with respect to other U.S. systems. Second, the list may be misleading because its entries would be based entirely on subjective descriptions by U.S. operators (who have different service offerings and business objectives) as to the scope of entry they enjoy in foreign markets. The Commission should consider instead reliance on the applications and (as explained below) annual certifications from licensees.

particular type of service(s) will have an untoward impact on the competitive opportunities for U.S. satellite networks. Having a sound basis for making that determination is more important than concerns regarding who supplied what piece of information.

As a last matter, Lockheed Martin strongly advises the Commission to remain vigilant against barriers arising after the earth station license has been granted. Lockheed Martin suggests that earth station licensees authorized to access non-U.S. satellites certify the absence of material changes in the regulatory state in the relevant markets on an annual basis. The certifications should be placed on public notice, and opponents would have the burden of showing that a change meriting reapplication of the ECO-Sat test has occurred.

IV. The Commission Should Take A Pragmatic, Flexible Approach To Identification Of The Relevant Markets For Comparison Of Effective Competitive Opportunities.

Lockheed Martin generally supports the Commission's approach to identifying the relevant markets for comparison of effective competitive opportunities. The "home" markets of the non-U.S. satellite should be presumed to be relevant, as would the "route markets" for non-U.S. satellites that resemble traditional, regional satellite systems. It remains to be seen precisely which satellite systems (in addition to global mobile-satellite systems) are suitable for the "critical mass" approach. Lockheed Martin is of the view, however, that the elements of the market analysis for purposes of implementing the ECO-Sat test are best determined in response to the particular circumstances of each case.

For example, it appears to be appropriate to employ some form of "critical mass" evaluation to a non-U.S. satellite that is part of a global fixed-satellite service system. Similarly, it may be appropriate to apply a home/route analysis to a non-US. mobile-satellite service system that would

provide service only on a regional or subregional basis. But the Commission must also look to factors such as whether a service is global and ubiquitous, or regional, as well as to whether user equipment is transportable or not, in order to determine what comparison approach to use. Applicants (and opponents) should both be able to opine as to which comparison market(s) are appropriate in the context of a particular application.[10/]

Accordingly, and in order for the Commission to apply the appropriate test to any given system, Lockheed Martin urges the Commission to adopt its proposed market analysis alternatives as guidelines, rather than rigid and necessarily complex rules, to facilitate decision-making on access to U.S. markets. Each non-U.S. satellite should then be individually evaluated using the most appropriate ECO-Sat approach.[11/]

10/ Lockheed Martin agrees with the Commission as to the reasonableness of conducting comparisons of effective competitive opportunities on a service-by-service basis. At the same time, the Commission must recognize that the results of particular comparisons of effective competitive opportunities may be of very limited precedential value, as the current trend toward "hybridization" of satellite systems — e.g., DTH/FSS, MSS/FSS, DBS/broadband FSS, and so on — takes firm root. The convergence of these realities makes it unlikely that any enduring "bright line" test can be identified.

11/ Indeed, there may even be circumstances where a hybrid approach is most effective. For example, if enforcement of route-by-route authority should turn out be feasible for certain global systems, the Commission might consider a combined "route market"/"critical mass" approach that prohibits any access to the U.S. until effective competitive opportunities exist for analogous U.S. satellites in a critical mass of markets. Once this critical mass exists, non-U.S. satellites would be authorized to serve the U.S. only on those specific routes that are open to U.S. satellites.

V. To The Extent That The "Critical Mass" Approach May Be Used For Comparison Of Competitive Opportunities, Several Characteristics Must Be Included As Part Of The Commission's Evaluation.

It seems clear that the "critical mass" approach will be appropriate for the evaluation of competitive opportunities for at least some service configurations. In defining the requisite "critical mass" for a given situation, Lockheed Martin believes the Commission should evaluate relevant characteristics of foreign markets open to U.S. satellite operators, and should set numerical benchmarks that are straightforward, reasonable, and designed to encourage the opening of foreign markets to U.S. system operators.

As for market characteristics, the Commission should evaluate such factors as the number of foreign markets open to U.S. systems, the populations of those countries, and the relative economic strength of the various countries. Considering the number of markets open to U.S. systems will signal to all foreign countries — large and small, developed and developing — that they have a stake in the opening of the U.S. market to non-U.S. systems, and thereby have an incentive to permit U.S. system operators to compete on a fundamentally fair basis in their markets. The populations of countries deemed part of the critical mass for a particular service or comparison also must be considered, as population statistics provide a rough proxy for the potential customer base, and allows appropriate refinement of what would otherwise be an overly simplistic country-by-country approach. Finally, considering the economic characteristics of foreign markets open to U.S. systems would measure the ability of particular populations to purchase the subject satellite

service, and would thereby gauge whether U.S. systems have a realistic opportunity economically to penetrate markets that are sufficiently developed.[12/]

When considered together, these factors operate as a check against possibly misleading results from reliance on any one of the factors. In the context of a regional mobile-satellite service system for the Western Hemisphere, for example, a U.S. system operator might have access to a large number of markets that reflect a high percentage of countries within the region, including the many small Caribbean and Central American nations. However, without access to markets with core populations and relative high economic standing (e.g., Canada, Mexico, Brazil, and Argentina), a U.S. system would probably not have effective competitive opportunities within the region. Similarly, if only populations were to be considered, undue weight may be ascribed to high-population countries at the expense of economically important markets with smaller populations.

In addition, the Commission should employ benchmarks that are straightforward, reasonable, and deigned to encourage the opening of foreign markets for U.S. systems. The benchmarks could be stated as percentages of markets globally or within a given region that are open to U.S. systems relative to the sum of markets globally or within that region. Setting a benchmark level too low, however, would create a disincentive for foreign administrations to open their markets, and could permit non-U.S. systems to access the "critical" U.S. market while sentencing U.S. system operators to a competitively disadvantaged fact abroad. Setting the benchmark levels too high could frustrate the goal of opening satellite communications markets if the perception abroad is one of U.S. protectionism.

12/ It would be appropriate for the Commission to refer to the gross domestic product or other similar broad economic indicia for the countries involved.

Again, Lockheed Martin emphasizes that the appropriate approach for a particular case is necessarily dependent on the circumstances. Lockheed Martin urges flexibility in this connection as well, and reserves the right to comment further on the particulars of the "critical mass" approach after it has had an opportunity to evaluate the comments submitted by other interested parties on this issue.

VI. The Commission Should Examine All Pertinent Attributes Of IGOs And Privatized IGO Spin-Offs When Considering A U.S. Earth Station Application To Communicate With Such Systems.

The Commission should apply its proposed market access policies both to privatized spin-offs of Intelsat and Inmarsat, and to the use of Intelsat and Inmarsat for purely U.S. domestic service. Since neither these spin-offs nor the use of Intelsat or Inmarsat for domestic service are protected by treaty, there is no legal barrier to applying the same market entry principles to them as are applied to their competitors. To the contrary, the application of these principles to all future satellite systems, including IGO spin-offs and domestic service by IGOs, is absolutely necessary to ensure a fair and competitive global satellite market.

To effectively apply its market entry policies to U.S. domestic IGO service and service by IGO spin-offs, the Commission must take into account the competitive advantages these systems may derive from the privileges, immunities, and related benefits conferred upon Intelsat or Inmarsat. The Commission correctly observes that these potential competitive advantages may arise because these organizations "have a treaty-based heritage and may continue to have at least some governmental ownership . . . [that may] result in privileged access to national markets around

the world and diminish effective competition in the U.S. market."[13/] Of equal concern are both the likely ties between IGOs and their spin-offs in the form of formal and informal business relationships, and intangible competitive advantages (such as the acquired experience, goodwill and contacts developed by Intelsat and Inmarsat under their treaty-based privileges and immunities) which cannot help but be passed on to some degree to IGO-spin offs and to IGO provision of U.S. domestic service.

The Commission can address these extraordinary concerns through a more rigorous ECO-Sat analysis, including specific consideration of the broader U.S. policy objectives related to the restructuring of the IGOs. Furthermore, as the Commission correctly notes, these concerns should be addressed at both the time of initially granting an IGO-related satellite access to the U.S. and subsequently, if space segment is transferred from an IGO to an affiliate for which U.S. access has already been authorized.[14/]

CONCLUSION

Lockheed Martin supports the Commission's efforts — as part of the U.S. Government's interrelated trade initiatives — to promote fair and open competition among satellite systems throughout the world. Such competition will substantially benefit U.S. and foreign consumers through lower consumer costs and increased service alternatives and the U.S. and foreign satellite industry through increased demand for service and a heightened need for innovation. Subject both to the caveat that the Commission must take a flexible stance in its application of the ECO-Sat test

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13/ NPRM, FCC 96-210, slip op. at ¶ 64.

14/ Id. at ¶ 74.

to the facts of each application, and to the realization that the facts of each case will differ, Lockheed Martin believes that the specific proposals advanced in the NPRM, as refined in accordance with the suggestions set forth in these Comments, will contribute toward achieving the Commission's pro-competitive objective.

Respectfully submitted,

LOCKHEED MARTIN CORPORATION

By: _____

Gerald Musarra
Senior Director, Commercial Programs
Space and Strategic Missles Sector
Lockheed Martin Corporation
1725 Jefferson Davis Highway
Arlington, VA 22202-4127

By: _____

Debra A. Smilley-Weiner
Deputy General Counsel
Lockheed Martin Astro Space Commercial
P.O. Box 800
Princeton, NJ 08543-0800

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